





In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 570

TAYLOR JUSTICE AND STELLA JUSTICE, APPELLANTS

v.

UNITED STATES OF AMERICA; GLEN B. JOHNSON, SPECIAL AGENT, INTERNAL REVENUE SERVICE; FIRST NATIONAL BANK OF PIKEVILLE, KENTUCKY; CITIZENS BANK OF PIKEVILLE, KENTUCKY; and PIKEVILLE NATIONAL BANK AND TRUST COMPANY, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

MOTION TO AFFIRM

The Solicitor General, on behalf of the United States of America and Glen B. Johnson, a Special Agent of the Internal Revenue Service, moves the Court to affirm the judgment of the district court.

STATEMENT

This action was initiated in the United States District Court for the Eastern District of Kentucky by appellees United States of America and Glen B. Johnson, Special Agent, Internal Revenue Service, under the provisions of 26 U.S.C. 7604 to enforce judicially administrative summonses that Agent Johnson had issued under the provisions of 26 U.S.C. 7602 and served on the three appellee banks, seeking disclosure of records belonging to the banks and reflecting banking transactions between them and appellants.[1] The application of the appellants to intervene in the enforcement proceedings was initially denied but thereafter the Sixth Circuit directed that the appellants be permitted to intervene. *Justice* v. *United States*, 365 F. 2d 312. (J.S. 2-3.)

In paragraph eighteen of the Intervening Complaint, appellants challenged the constitutionality of 26 U.S.C. 7604(a) and (b) and demanded a restraining order to enjoin the enforcement of the summonses (J.S. 19). Pursuant to 28 U.S.C. 2282 and 2284, a three-judge district court was convened to hear and determine the constitutional issue (J.S. 19-20). Appellants urged that the government's efforts were directed toward securing evidence to be used against

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[1] The records sought were bank statements, bank ledger sheets, deposit tickets, any microfilm that would show any canceled checks which cleared through appellants' bank account, cashier's checks, certified checks, and note ledger sheets (Hearing of May 12, 1967, p. 42). All of these records were in the possession of the banks (id., p. 47).

them in a criminal proceeding and that therefore the proceeding violated their constitutional rights under the Fourth and Fifth Amendments (J.S. 20). The three-judge court found this argument to be without merit, held the statute constitutional, and denied the request for an injunction (J.S. 21).

ARGUMENT

Section 7602 of the Internal Revenue Code of 1954 allows the use of summonses such as the ones issued here "[f]or the purpose of ascertaining the correctness of any return" and other specified purposes. Petitioner reasserts here what was his principal contention below—that the summonses issued in this case were not for such purposes but were in reality solely for use in a criminal investigation. There is no evidence to support this charge. Johnson's testimony, which the court below accepted (J.S. 20), was that the purpose of the investigation was "to determine the accuracy of the income tax returns of the taxpayers." This Court has said, "If a taxpayer has filed fraudulent returns, a tax liability exists * * *. Section 7602 authorizes the Commissioner to investigate any such liability." *United States* v. *Powell*, 379 U.S. 48, 53. The mere fact that the information thus obtained may eventually be used in criminal, as well as civil, proceedings does not affect the validity of the summons. *Wild* v. *United States*, 362 F. 2d 206, 209 (C.A. 9); *Boren* v. *Tucker*, 239 F. 2d 767, 772-773 (C.A. 9); *In re Magnus, Mabee & Reynard, Inc.*, 311 F. 2d 12, 16

(C.A. 2), certiorari denied, 373 U.S. 902; *Tillotson* v. *Boughner*, 333 F. 2d 515, 516-517 (C.A. 7), certiorari denied, 379 U.S. 913; *Wright* v. *Detwiler*, 345 F. 2d 1012 (C.A. 3), affirming *per curiam* 241 F. Supp. 753 (W.D. Penna.).

Appellants' other claim is that their privilege against self-incrimination gave them a right to have the summonses quashed. But the papers and effects which the Fifth Amendment privilege protects are the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity. *United States* v. *White*, 322 U.S. 694, 699. A taxpayer has no rights or privileges with respect to records belonging to a third party reflecting transactions of the taxpayer. *DeMasters* v. *Arend*, 313 F. 2d 79, 85 (fn. 11) (C.A. 9), petition for certiorari dismissed, 375 U.S. 936; *Application of Cole*, 342 F. 2d 5, 7-8 (C.A. 2), certiorari denied, 381 U.S. 950; *Zimmerman* v. *Wilson*, 105 F. 2d 583, 586 (C.A. 3); cf. *Schulze* v. *Rayunec*, 350 F. 2d 666, 668 (C.A. 7); certiorari denied *sub nom. Boughner* v. *Schulze*, 382 U.S. 919.

None of appellants' records were sought. The only records sought by the summonses are those belonging to, and in the possession of, the banks. The court below invited appellants to demonstrate their property interest in the documents that the summonses demanded (J.S. 15). But no such proof was adduced.

The cases relied upon by appellants (J.S. 15-16) for the proposition that they have proprietary rights in the banks' records do not aid them. *Brex* v. *Smith*,

146 Atl. 34, a case from a lower New Jersey court, simply holds that a bank should not disclose certain records to a prosecutor until ordered to do so by a court of competent jurisdiction. In *Peterson* v. *Idaho First National Bank*, 83 Idaho 578, 367 P. 2d 284, the court allowed a suit for damages based on a bank's alleged disclosure, unauthorized by the depositor or "by law," of a depositor's transactions to a third party—the depositor's employer. *Zimmermann* v. *Wilson*, 105 F. 2d 583 (C.A. 3), involved the records of a broker reflecting a client's transactions; the court of appeals held that the client was not entitled to invoke the protection of the Fourth Amendment. See 105 F. 2d at 586.

No substantial question is presented and the judgment of the district court should be affirmed.

Respectfully submitted.

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